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CITY OF LOMPOC

STATE OF CALIFORNIA

PUBLIC EMPLOYMENT RELATIONS BOARD

LOMPOC POLICE OFFICERS
ASSOCIATION,

Charging
Party/Respondent,

v.

CITY OF LOMPOC,

Respondent/Charging
Party.

Case No. LA-CE-555-M; LA-CE-564-M;
LA-CE-585-M; LA-CO-100-M

**CITY OF LOMPOC'S RESPONSE TO
LOMPOC POLICE OFFICERS
ASSOCIATION'S STATEMENT OF
EXCEPTIONS AND BRIEF IN SUPPORT
OF STATEMENT OF EXCEPTIONS; AND
CITY OF LOMPOC'S CROSS-
EXCEPTIONS AND BRIEF IN SUPPORT
OF CROSS-EXCEPTIONS TO
ADMINISTRATIVE LAW JUDGE'S
PROPOSED DECISION DATED MAY 9,
2012**

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1 The CITY OF LOMPOC ("City") hereby submits its Response to the Statement of
2 Exceptions filed by the LOMPOC POLICE OFFICERS ASSOCIATION ("LPOA") pursuant to
3 Title 2, California Code of Regulations ("PERB Regulations") sections 32310 and 32140. In
4 addition, pursuant to PERB Regulations sections 32300 and 32310, the City submits its own
5 cross-exceptions to the proposed decision dated May 9, 2012, along with an accompanying brief
6 in support of its cross-exceptions.

7 The City's Response and Cross-Exceptions with supporting brief is timely as LPOA's
8 service upon the City was by mail from within the State of California. PERB Regulations section
9 32130, subdivision (c) provides a five day extension of time to any filing made in response to
10 documents served from within the State of California. (*City of Alhambra* (2011) PERB Dec. No.
11 2161-M.)

12 **I. STATEMENT OF THE CASE**

13 This case comes before the Board because LPOA has filed exceptions to the May 9, 2012
14 Proposed Decision issued by the Administrative Law Judge ("ALJ") in this matter. In that
15 Proposed Decision, the ALJ limited the "make-whole" remedy to the non-sworn members of the
16 LPOA, and specifically excluded the sworn members from that remedy due to PERB's lack of
17 jurisdiction over persons who are peace officers as defined in Penal Code section 830.1. The City
18 agrees with the ALJ's exclusion of the sworn members from the proposed remedy, and opposes
19 LPOA's exceptions.

20 This case is also before the Board because the City has filed its own exceptions to the
21 ALJ's proposed decision. The City excepts to the ALJ's proposed decision to the extent it found
22 that the City engaged in unilateral action by implementing a 10.769 percent salary reduction.
23 Contrary to the ALJ's findings, the record establishes that the implementation was reasonably
24 comprehended within the City's prior proposals. Indeed, the record shows that throughout
25 negotiations the City repeatedly advised the LPOA that it needed to obtain a 5% savings in both
26 the 2009-2010 and 2010-2011 fiscal years, *i.e.*, an amount which totaled \$249, 365 per fiscal
27 year, and that the longer the negotiations took the less time there would be to obtain those savings
28 and the greater the impact on LPOA members. The record contains no evidence that the LPOA

1 ever advised the City that it did not understand what that meant.

2 The record also establishes that when the City presented its Revised Last, Best and Final
3 Offer to the LPOA, it presented it as a proposal while the parties were participating in a
4 mediation. The record also shows that the City invited the LPOA to discuss the proposal prior to
5 it being presented to the City Council for impasse resolution. Because the City provided notice
6 and an opportunity for the LPOA to bargain, the City's Revised Last, Best and Final Offer does
7 not constitute a "take-it-or-leave-it proposal," and does not constitute a "take-it" proposal either.

8 Because the City provided notice and an opportunity to bargain, its implementation of the
9 Revised Last Best and Final offer simply does *not* constitute an unlawful unilateral action.

10 The City also excepts to the ALJ's proposed make-whole remedy because it is ambiguous
11 as to whether it is ordering the City to reimburse the non-sworn unit members the entire 10.769%,
12 or just the additional 5.769% deducted from January 2010 through June 2010.

13 The City respectfully requests that the Board modify the ALJ's proposed decision, and
14 dismiss the Complaint and Unfair Practice Charge which issued in case number LA-CE-585-M
15 with prejudice. The ALJ's proposed decision, which found that the City's implementation of the
16 Revised Last, Best and Final Offer constitutes an unlawful unilateral action, is unsupported by the
17 record and reaches conclusions contrary to the evidence and governing law.

18 **II. STATEMENT OF FACTS**

19 **A. CITY NOTIFIES LPOA OF ITS FINANCIAL PROBLEMS PRIOR TO** 20 **COMMENCING NEGOTIATIONS**

21 On October 23, 2008, William Yanonis, the City's Human Resources Director and the
22 City's negotiator, and Ken George, the LPOA's chief negotiator met for a pre-negotiations
23 meeting. (Reporter's Transcript ("TR"), 2/22/11, p.12:18-28; p.13:14-16; p.13:25-14:7; 2/23/11,
24 pp.6-8, 31-32.) During that meeting, they discussed the City's financial problems, how its
25 revenues did not compare to that of other cities, and how the City was unsure as to the amount of
26 money the state would withhold from the City. Mr. Yanonis recommended that Mr. George look
27 at the current Memorandum of Understanding ("MOU") and get creative. They also discussed
28 possible dates to start negotiations. (TR 2/22/11, p.16:11-17:15; p.17:26-18:4; TR 2/23/11,

1 p.10:3-28; p.39:28-40:18.)

2 **B. THE CITY REITERATES ITS FINANCIAL CONCERNS AT THE**
3 **PARTIES' FIRST NEGOTIATION SESSION ON DECEMBER 30, 2008**

4 In December 2008, the City was facing a \$2,500,000 budget deficit in its general fund,
5 due in part to declining tax revenues. At the outset of the negotiations that started December 30,
6 2008, the parties discussed and agreed upon ground rules. Those ground rules authorized a party
7 to submit package proposals, meaning that rejection of any one item would constitute rejection of
8 the entire proposal. (TR 2/22/11, p.23:6-24:7; p.148:27-149:11; TR 2/23/11, p.40:19-25; p.73:11-
9 74:1; p.144:19-21; TR 2/24/11, p.9:6-9; Exs. D,YY.)

10 During that meeting, Mr. Yanonis referenced the City's financial problems, and noted that
11 everything was on the table, including furloughs and salary cuts. Mr. Yanonis also explained that
12 the City did not know how bad its budget situation would be because it was still waiting on
13 information from the state. (TR 2/22/11, p.24:16-25:4; p.117:5-27; p.143:28-144:6; TR 2/23/11,
14 p.13:13-28; p.79:11-17; p.84:8-85:12; p.119:7-22; p.120:18-27; p.121:4-10; p.163:11-17; TR
15 2/24/11, p.10:19-12; p.12:26-p.13:7; Ex. VV, Ex. 4.)

16 The LPOA then presented the City with its initial proposal. That proposal, which called
17 for a four-year agreement, very clearly showed that the LPOA was looking for significant
18 economic *increases*. The City reviewed each item of the proposal, and Mr. Yanonis advised the
19 LPOA that its proposal was staggering in terms of the economic impact it would have on the City.
20 He also explained that the City would have to get actuarial valuations to consider the LPOA's
21 request for PERS enhancements. (TR 2/22/11, p.20:1-4, p.20:18-25; p.21:1-22:21; p.52:23-26;
22 p.125:20-126:23; TR 2/23/11, p.11:17-12:2; p.44:26-45:10; p.79:11-17; p.88:6-89:28; p.119:7-
23 120:14; p.120:18-121:3; p.121:15-23; TR 2/24/11, p.100:2-28; p.101:12-3; Exs. C, WW.)

24 Although the City did not expressly ask the LPOA to come back with a proposal that
25 contained decreases, both the City and the LPOA understood that was what the City wanted,
26 given the information the City had provided about its financial problems. The City asked the
27 LPOA to get creative with the MOU in a way that did not impact finances. LPOA Vice President
28 Bryan Dillard understood that to mean that "[t]hey wanted us to come back with something

1 completely different that had no increases at all.” (TR 2/23/11, p.157:23-159:8; TR 2/24/11,
2 p.10:19-12:12.)

3 C. THE CITY DETAILS ITS FINANCIAL CONDITION TO THE LPOA AT
4 THE JANUARY 15, 2009 MEETING

5 When the parties met again on January 15, 2009, Rene Visé, the City’s former
6 Management Services Director, detailed the City’s financial condition in a “State of the City”
7 presentation which lasted about 45 minutes. During that presentation, he explained that the City’s
8 budget deficit was in the millions of dollars, that revenues were down, and that the City was in a
9 downward economic spiral. He also explained that, because the City was still waiting to get
10 information from the state as to how much revenue would be taken from the City, and therefore
11 the City’s entire financial picture was not clear. (TR 2/22/11, p.17:18-25; p.25:8-28; p.121:2-25;
12 p.122:19-21; p.123:1-13; TR 2/23/11, p.45:11-19; p.74:8-75:17; p.122:6-18; p.123:11-13;
13 p.123:20-28; TR 2/24/11, p.15:13-25; p.16:6-10.) The City also, once again, brought up the
14 possibility of furloughs and other cuts due to a progressively worsening economy. (TR 2/22/11,
15 p.26:1-8.)

16 D. THE CITY ADVISES THE LPOA THAT NO ECONOMIC INCREASES
17 ARE LIKELY, AND THAT CONCESSIONS ARE NEEDED

18 During the parties’ February 5, 2009 meeting, Mr. Yanonis informed the LPOA that the
19 City Council’s direction was that there would be no wage increases, and that furloughs, changes
20 to health care, and other cuts, were possible. The LPOA responded by simply asking if the City
21 had any ideas. (TR 2/22/11, p.26:9-16; p.27:3-10; p.124:23-125:14; p.143:28-149:12; TR
22 2/23/11, p.93:24-94:22; p.124:14-21; p.146:8-23; Ex. VV, YY.)

23 E. THE CITY PRESENTS THE LPOA WITH ITS INITIAL PROPOSAL
24 WHICH CALLS FOR A 5% ANNUAL REDUCTION IN SALARY IN
25 EACH FISCAL YEAR

26 The parties met again on April 16, 2009. During this meeting, the City presented its first
27 formal proposal to the LPOA. In explaining the City’s proposal, Mr. Yanonis advised that the
28 City was looking for a 5% annual reduction in salary in *both* the 2009-2010 fiscal year and 2010-
2011 fiscal year. To achieve that 5% annual reduction in salary in *both* years, the City’s proposal
called for the elimination of holidays and establishing one furlough day. (TR 2/22/11, p.28:20-21;

p.30:4-7, p.30:18-31:5; p.31:9-20; p.32:4-12; p.33:2-5; p.36:10-13; p.131:7-13; p.133:17-134:7; p.134:27-135:26; p.136:4-13; TR 2/23/11, p.18:2-27; p.20:4-12; p.47:5-7; p.48:3-9; p.125:16-126:5; TR 2/24/11, .17:13-28; p.19:2-20:3; Ex. E.)

The City also provided the LPOA with the City's General Fund budget projections for 2009 to 2011, which identified a 5% reduction in salary *for each of the two fiscal years*. By this time, the City's projected budget deficit had effectively doubled to \$5,100,000. (TR 2/22/11, p.33:13-34:16; p.35:14-22; p.157:25-158:16; TR 2/23/11, p.47:8-23; p.82:5-22; p.95:15-96:8; p.126:1-23; Ex. F.)

The LPOA, however, spent its time during this meeting opining as to why police were more important than firefighters, and why they should not be subject to the same cuts. Although the LPOA felt that the City should be using its reserves to provide wage increases, that was not an option because the City did not know how long the recession would last, or how long its tax revenues would continue to decline. (TR 2/22/11, p.28:25-29:23; p.128:18-129:14; TR 2/23/11, p.48:23-49:10.; p.50:2-8; p.92:11-21; Ex. VV.)

F. THE CITY DECLARES IMPASSE

On May 1, 2009, the parties again met for negotiations and the LPOA presented the City with another proposal. That proposal, however, was essentially the same as its December 30, 2008 proposal. This lack of movement by the LPOA on economic increases after the City had detailed its worsening financial situation to the LPOA in all of the prior negotiation sessions led the City to declare impasse and provide an impasse letter to the LPOA. (TR 2/22/11, p.42:7-43:22; p.44:28-45:7; p.137:26-138:28; p.139:20-140:1; p.143:10-22; TR 2/23/11, p.20:13-24; p.57:24-26; p.58:2-4; p.128:12-26; p.147:23-148:2; TR 2/24/11, p.21:1-11; p.22:5-22; Exs. J, K, YY.)

G. THE LPOA BREAKS IMPASSE WITH NEW PROPOSAL

Although the LPOA was not happy with the declaration of impasse, after a brief caucus, the LPOA came back with another proposal. That proposal broke the impasse because it represented a significant change in position, and the parties resumed bargaining. After further discussions, the LPOA submitted another proposal to the City. Although the proposals did not

1 accept the City's needed 5% savings, the number of issues in dispute had narrowed from the
2 December 30, 2008 proposal. The two proposals also no longer included the requested salary
3 increases reflected in the LPOA's previous proposals. (TR 2/22/11, p.45:22-47:8; p.48:1-49:15;
4 p.146:18-21; p.146:27-147:26; p.149:15-28; TR 2/23/11, p.23:11-24:4; p.58:5-7; p.129:10-22;
5 p.131:4-8; TR 2/24/11, p.22:23-23:1; Exs. L, M).

6 **H. MAY 14, 2009 MEETING AND PROPOSAL**

7 On May 14, 2009, the City presented the LPOA with a comprehensive package proposal,
8 that was a clean up of the City's last proposal to the LPOA on May 1, 2009. (TR 2/22/11, p.20-
9 24; p.53:2-54:1; p.150:6-151:15; TR 2/23/11, p.58:14-27; p.63:25-64:8; p.131:18-26; p.132:4-20;
10 TR 2/24/11, p. 24:7-16; p.27:20-28:3; Exs. O, P.)

11 **I. THE CITY REPEATEDLY NOTIFIED THE LPOA THAT THE LONGER**
12 **NEGOTIATIONS TOOK THE LESS TIME THE CITY WOULD HAVE TO**
13 **RECOUP THE NECESSARY 5% SAVINGS NEEDED FOR FISCAL YEAR**
14 **2009-2010**

15 Throughout negotiations, the City advised the LPOA of its concern that the longer
16 negotiations took, the less time the City would have to obtain the 5% savings it needed in both
17 fiscal year 2009-2010 and in fiscal year 2010-2011, which, in turn, would result in a greater
18 impact on employees. The City also expressed concerns about the impact a compressed time
19 frame would have on the Police Department's ability to maintain staffing levels if that 5% savings
20 was obtained through furloughs. (TR 2/22/11 p.55:15-28; p.56:15-57:10; p.160:2-161:18; TR
21 2/23/11, p.29:17-30:12; p.96:9-21; p.97:12-98:11; p.162:15-21; TR 2/24/11, p.68:1-6; Ex. Q.)

22 **J. THE LPOA RETAINS NEW LEAD NEGOTIATOR**

23 On June 11, 2009, Michael McGill, of Lackie, Dammeier and McGill took over as the
24 LPOA's chief negotiator. (TR 2/22/11, p.60:11-65:8; p.157:13-19; p.159:6-23; p.166:19-169:12;
25 p.196:4-18; TR 2/23/11, p.60:27-61:14; Exs. S and T.) Between June 12, 2009 and August 6,
26 2009, the City made several requests to Mr. McGill about scheduling negotiation dates.
27 However, Mr. McGill failed to respond to those requests. (TR 2/22/11, p.60:11-64:16; p.65:10-
28 66:4; p.69:1-26; p.157:13-19; p.159:6-23; p.161:19-162:3; p.162:25-163:14; p.164:19-165:22;
p.166:19-167:3; p.169:13-25; p.171:7-11; p.196:4-18; TR 2/23/11, p.60:27-61:14; Exs. S, T, U,

V, W; Ex. 42.) Only after the City filed its UPC, did Mr. McGill finally contact the City about scheduling negotiation dates, and when he did he agreed to a date for later that month. (TR 2/22/11, p.69:24-70:4; p.70:16-71:13; p.173:2-18; Ex. Y.)

K. AUGUST 27 AND 28, 2009 NEGOTIATIONS

The parties did not meet again until August 27, 2009, i.e., more than three months after the parties last met and more than two months after the City learned the LPOA had retained Mr. McGill as its new negotiator. At the start of the meeting, Mr. McGill questioned whether the City had responded to the LPOA's December 30, 2008 proposal. Mr. Yanonis explained that the City had gone over each item in that proposal, and that the LPOA had since submitted subsequent proposals. Mr. McGill, however, still wanted clarification of the City's response to that initial December 30, 2008 proposal. In response, Mr. Yanonis prepared a brief summary of the negotiations to date, which he presented to Mr. McGill. (TR 2/22/11, p.71:13-72:12; p.73:1-7; p.173:19-174:7; TR 2/23/11, p.129:26-130:21; p.134:27-15; p.148:12-22; Exs. Z, YY.

The City also presented the LPOA with a comprehensive package proposal. But because of changed circumstances, namely the fact that some of the holidays had either passed or were quickly approaching, obtaining the 5% savings (i.e., \$249,365) for fiscal year 2009-2010 through unpaid holidays was no longer a viable option. As a result, the City's proposal excluded unpaid holidays as an option, but called for a 5% salary reduction or 13 unpaid vacation days (which amounted to 104 work hours). (TR 2/22/11, p.73:8-15; p.74:15-21; p.175:15-176:12; TR 2/23/11, .136:24-26; Ex. AA.) In support of its proposal, the City also provided the LPOA with its PERS evaluation reports, medical and dental premium reports, and an unredacted copy of the General Fund budget projections for fiscal years 2009-2010 and 2010-2011. The LPOA, however, responded that it was standing by its initial proposal from December 30, 2008. (TR 2/22/11, p.72:8-18; p.75:3-19; p.76:20-77:21; p.79:21-27; p.80:21-25; p.234:4-23; Exs. BB, CC.)

At the August 28, 2009 meeting, the LPOA presented the City with another proposal. Even though the LPOA had now conceptually agreed to accept furloughs of 104 work hours for each year, its new proposal did not move the parties any closer to agreement. Rather, it moved them farther apart. Whereas the proposals the LPOA presented in May 2009 had identified four

1 outstanding issues, the August 28, 2009 proposal raised several new issues for the first time.
2 Specifically, the LPOA had now added binding arbitration, layoff protection, and pay for donning
3 and doffing uniforms as issues for bargaining. None of these issues, however, had previously
4 been brought up at the bargaining table. (TR 2/22/11, p.81:10-82:21; p.177:14-18; p.178:11-
5 16;p.178:22-179:18; p.179:1-9;p.200:9-22; TR 2/23/11, p.137:20-138:19; p.143:15-19; p.168:1-
6 27; Exs. L, M, DD.)

7 Although the City was concerned about the LPOA adding new issues for bargaining, the
8 City went over each item of the new proposal with the LPOA. And, as to one particular item
9 (maintenance of benefits clause), Mr. Yanonis specifically asked Mr. McGill to provide contract
10 language so the City could properly consider the request. (TR 2/22/11, p.82:22-28; p.180:26-
11 181:7; TR 2/23/11, p.137:14-26.)

12 During both of these meetings, Mr. Yanonis again voiced concern about how the longer
13 the negotiations took, the larger the impact the cuts would have on employees since the City had
14 not changed its position about needing 5% savings from the LPOA for both fiscal year 2009-2010
15 and fiscal year 2010-2011. (TR 2/22/11, p.80:26-81:9.)

16 L. **THE CITY PRESENTS THE LPOA WITH ANOTHER COMPREHENSIVE**
17 **PACKAGE PROPOSAL**

18 On September 3, 2009, Mr. Yanonis emailed Mr. McGill a new package proposal. With
19 that new package proposal, the City was willing to do straight furlough days instead of “unpaid
20 vacation days.” However, because the City was still very concerned about the fact that the
21 longer negotiations took the less time there would be to take those furloughs, and the greater
22 impact the \$249,365 reduction would have on employees, Mr. Yanonis once again expressed the
23 City’s concerns to Mr. McGill. (TR 2/22/11, p.85:7-86:22; p.87:23-88:21; p.182:4-22; TR
24 2/23/11, p.138:20-139:5; Exs. FF, GG, HH.) Those concerns, once again, went unheeded.

25 M. **SEPTEMBER 29, 2009 LAST, BEST AND FINAL OFFER**

26 Although the parties met again on September 10, 2009, by the September 29, 2009
27 meeting the LPOA had still not responded to the City’s September 3, 2009 package proposal.
28 When the City asked the LPOA if it had a counter-proposal, the LPOA caucused for about 50

1 minutes, then returned and advised the City that it had no counter-proposal. It was then that the
2 City issued its Last, Best and Final Offer ("LBFO") to the LPOA. Mr. Yanonis also, once again,
3 explained that the longer the negotiations took the greater the impact would be since the window
4 of opportunity for the City to obtain the 5% savings (i.e., \$249,365) in fiscal years 2009-2010 and
5 2010-2011 would also be shrinking. (TR 2/22/11, p.91:12-14; p.92:10-28; p.183:8-184:5;
6 p.186:12-187:12; TR 2/23/11, p.108:12-109:6; p.111:14-24; p.149:25-150:8; TR 2/24/11,
7 p.39:11-40:4; Exs. JJ, VV, YY.)

8 N. **THE LPOA CANCELS THE OCTOBER 30, 2009 MEETING; THE CITY**
9 **DECLARES IMPASSE**

10 The parties' next negotiation meeting was scheduled for October 30, 2009. Mr. McGill,
11 however, did not appear. Instead, Mr. Dillard appeared and presented Mr. Yanonis with a copy of
12 a letter from Mr. McGill advising that he would not be at that meeting. Mr. Dillard also advised
13 Mr. Yanonis that the LPOA had rejected the City's September 29, 2009 LBFO. Until Mr. Dillard
14 handed him the letter, Mr. Yanonis had not received any communication from Mr. McGill
15 advising him that he would not be at the meeting. Mr. Yanonis had not received any phone call
16 or message from Mr. McGill to cancel the meeting, and he had not yet received the letter that Mr.
17 McGill mailed him via regular mail. (TR 2/22/11, p.93:1-17; p.188:16-28; TR 2/23/11, p.141:5-
18 14; TR 2/24/11, p.42:9-20; Ex. KK.)

19 Mr. Yanonis then declared impasse. Although Mr. McGill was not present, Mr. Yanonis
20 explained the City's procedures for impasse resolution and asked to have the impasse meeting at
21 that time. Mr. Dillard, however, advised that he did not want to do anything without Mr. McGill
22 present. (TR 2/22/11, p.94:24-95:8; p.95:24-97; p.189:9-18; TR 2/23/11, p.141:15-19; TR
23 2/24/11, p.43:3-19; Ex. LL.)

24 O. **THE PARTIES PARTICIPATE IN MEDIATION BUT DO NOT RESOLVE**
25 **THEIR DISPUTE**

26 As a result of subsequent communications between Mr. Yanonis and Mr. McGill
27 regarding the City's impasse resolution procedures, the LPOA waived the impasse meeting and
28 opted to go straight to mediation. (TR 2/22/11, p.97:21-101:21; 102:15-103:12; p.192:28-193:2;
Exs. MM, OO, and PP; Ex. 34.) On December 18, 2009, the parties participated in mediation

1 with Tony Butka, a mediator with the State Mediation and Conciliation Service ("State
2 Mediation"). The parties, however, were unable to reach agreement. Near the end of the
3 mediation, the City had Mr. Butka present the LPOA with a Revised LBFO, which the LPOA
4 rejected without asking any questions. (TR 2/22/11, p.103:13-104:24; p.193:3-17; TR 2/23/11,
5 p.141:20-142:18; p.150:21-26; p.151:10-15; TR 2/24/11, p.43:20-44:6; p.45:6-11; Ex. QQ.)

6 The City identified its December 18, 2009 proposal as a revised LBFO to account for the
7 passage in time, and the shorter period of time within which to obtain the needed cost savings of
8 \$249,365 for the 2009-2010 fiscal year. That amount remained the same through all of the City's
9 proposals. (TR 2/22/11, p.104:25-105:19; p.199:10-20; TR 2/23/11, p.114:15-115:9; p.143:6-14;
10 p.151:16-19; TR 2/24/11, p.68:7-69:13; p.70:23-26; Exs. F, CC, QQ, VV.)

11 **P. THE CITY IMPLEMENTS ITS REVISED LAST, BEST AND FINAL**
12 **OFFER**

13 On December 29, 2009, Mr. Yanonis provided Mr. McGill written notice that the City
14 Council would be considering the impasse during its regularly scheduled meeting on January 5,
15 2009. In that notice, Mr. Yanonis referred to the parties' December 18, 2009 mediation and noted
16 that the mediator had informed him "that the LPOA did not have any questions regarding the
17 offer." Mr. Yanonis also invited LPOA to contact him if any questions arose. There is no
18 evidence that either Mr. McGill or LPOA ever did. On January 5, 2010, the City Council voted
19 to impose the revised LBFO, and Mr. Yanonis sent written notice to Mr. McGill of the
20 imposition. (TR 2/22/11, p. p.105:25-106:5; 106:24-107:3; p.193:18-24; Exs. RR, SS.)

21 **III. THE CITY'S RESPONSE TO LPOA'S STATEMENT OF EXCEPTIONS**

22 The LPOA presents just one exception to the ALJ's proposed decision, i.e., it takes
23 exception to the ALJ's finding that the "make whole" remedy that the Board can order does not
24 extend to unit members who are peace officers as defined by Penal Code section 830.1. (See
25 LPOA's Statement of Exceptions, p.2:12-14.) As explained below, LPOA's exception is without
26 merit.

27 ///

28 ///

1 A. **EXHIBITS B AND C ATTACHED TO LPOA'S EXCEPTIONS ARE**
2 **IRRELEVANT AND SHOULD NOT BE CONSIDERED**

3 In support of its one exception, the LPOA relies upon a failed Senate Bill and its
4 legislative history as purported proof that the Legislature understood section 3511 as only
5 exempting all peace officer units and individual police officers from PERB's jurisdiction. (See
6 LPOA's Statement of Exceptions, p.4:4-19, and Exs. B and C attached thereto.) The Board,
7 however, should not consider these exhibits because they are irrelevant to the issue of whether the
8 ALJ erred in excluding the sworn unit members from the "make-whole" remedy. The failed
9 Senate Bill never became law, and as such its legislative history is utterly irrelevant. Moreover, it
10 does not support the point LPOA attempts to make because, as indicated in the Governor's veto
11 message, his concern was the inconsistent treatment of *non-peace officers* in mixed units with
12 majority peace officers, and *non-peace officers* in mixed units without a peace officer majority.
13 (See LPOA's Ex. C, attached to its Statement of Exceptions.). There was no discussion about the
14 impact on peace officers.

15 Further, even if the Board were to consider these two exhibits, the fact remains that the
16 LPOA failed to comply with PERB Regulation 32635(b), which states that, "(u)nless good cause
17 is shown, a charging party may not present on appeal new charge allegations or new supporting
18 evidence." The LPOA, however, has not shown good cause for not presenting this purported
19 "evidence" previously. Indeed, the LPOA has not explained why it could not have presented
20 during the hearing the very exhibits it now feels supports its claim that PERB's make whole
21 remedies should apply to the entire unit rather than just those employees who come within
22 PERB's jurisdiction. Because the LPOA has not complied with PERB Regulation 32636(b),
23 PERB should not consider exhibits B and C attached to the LPOA's Statement of Exceptions.

24 B. **PERB'S LACK OF JURISDICTION OVER THE LPOA'S SWORN**
25 **MEMBERS EXTENDS TO "MAKE WHOLE" REMEDIES IN MIXED-**
26 **UNITS**

27 The MMBA expressly provides that PERB does not have jurisdiction over Penal Code
28 section 830.1 peace officers. (Gov. Code § 3511.) In arguing that PERB has interpreted
Government Section 3511 as allowing it to assert jurisdiction over mixed units that include Penal

Code section 830.1 peace officers, the LPOA points to PERB's decision in *County of Sonoma* (2010) PERB Dec. No. 2100-M. As noted by the LPOA, the mixed unit in Sonoma "included Penal Code section 830.1 peace officers." (See LPOA Exceptions, p.3:19-22.)

That case, however, does not support the LPOA's claim that PERB can issue remedies on behalf on Penal Code section 830.1 peace officers who are part of a mixed-unit. Instead, the record shows that the administrative law judge did, in fact, exclude peace officers from the proposed remedial order and that PERB did not find that exclusion improper. (See *County of Sonoma* (2008) 33 PERC ¶ 6.) Moreover, while the LPOA points to a failed senate bill to support its claim that PERB has jurisdiction over mixed-units, it fails to explain how, even if true, any of that legislative history supports its claim that the ALJ erred in excluding the Penal Code section 830.1 peace officers from the proposed "make-whole" remedy " (See LPOA exceptions, p.2:24-5:9.)

There is no dispute that Government Code section 3511 excludes Penal Code section 830.1 peace officers from PERB's jurisdiction. Neither is there any dispute that PERB has broad discretion to take action and issue orders as necessary to effectuate the purposes and policies of the MMBA. (Govt. Code § 3509.) Since the purposes and policies of the MMBA specifically exclude Penal Code section 830.1 peace officers from PERB's jurisdiction, a remedial order limited to certain classifications is not contrary to the MMBA. Consequently, because the LPOA has failed to demonstrate that the ALJ's make-whole remedy is improper, the LPOA's exception lacks merit and should be rejected.

IV. CITY OF LOMPOC'S STATEMENT OF CROSS-EXCEPTIONS

Pursuant to PERB Regulation 32300, Respondent City of Lompoc hereby submits cross-exceptions to the ALJ's proposed decision issued on May 9, 2012, in case number LA-CE-585-M. The City respectfully requests that the Board reverse the proposed decision to the extent it found that the City engaged in unilateral action by implementing a 10.769 percent salary reduction, and that the Board dismiss the Complaint and Unfair Practice Charges which issued in that case with prejudice, as authorized by PERB Regulation 32320.

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EXCEPTION NO. 1:

Exception is taken to the ALJ's finding, at page 10 of the proposed decision that "Yanonis was not more specific about the possible 'greater one-time effect' or 'greater one time economic impact' on employees." This finding is excepted to because the ALJ fails to give proper weight to the fact that there is not evidence that the LPOA never indicated that it did not understand what Mr. Yanonis meant by these statements. In the one instance when the LPOA did actually ask Mr. Yanonis to explain himself, Mr. Yanonis responded by noting that the longer it took to reach an agreement, "the narrower the window became for the City to recover its cost savings that it was trying to get." The LPOA, however, did not indicate that it did not understand that explanation, or that it ever asked for further clarification.

This finding is also excepted to because it relieves the LPOA of any responsibility to seek clarification of proposals it purportedly did not understand. Since the LPOA never notified the City that it did not understand the City's statements or proposals, it is unreasonable to hold the City accountable for not being more specific on an issue it did not know needed more specificity. In *Healdsburg Union High School District/Healdsburg Union School District/San Mateo City School District* (1984) PERB Dec. No. 375-E, PERB held that "[a] refusal to address in any manner proposals which are unclear is inconsistent with the statutory obligation" to bargain in good faith. (*Healdsburg*, supra at p.9.) Although that case dealt with a situation in which there was ambiguity as to whether a bargaining proposal was negotiable, PERB's rationale is equally applicable here:

...it is necessary to balance an employer's duty to negotiate in good faith and its right to be adequately informed of the exclusive representative's specific negotiating interests. The resolution we find to be both practical and consistent with the give-and-take of the bargaining process is to utilize that process itself to resolve the ambiguities present in bargaining proposals.... We do not suggest that the objecting party must wrestle to a fall with every ambiguity, or search out every negotiable or objectionable word or phrase. But its efforts must be consonant with the legislative intent that negotiations serve as a method of improving personnel management and communication between employees and their public [] employers. (*Healdsburg*, supra at pp.9-10.)

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1 Again, if the LPOA truly found the City's salary proposals to be so ambiguous and
2 unclear, then it was the LPOA's obligation to seek clarification.

3 This finding is also excepted to because the uncontroverted evidence shows that,
4 throughout negotiations Mr. Yanonis repeatedly referred to the shrinking time frame for the City
5 to obtain the needed savings. The evidence further shows that Mr. Yanonis made those
6 statements both when proposing furloughs hours and again when proposing a salary reduction.

7 Moreover, the uncontroverted evidence also shows that the LPOA clearly knew that the
8 City's proposals called for obtaining a certain amount of savings during each fiscal year. For
9 example, when the City proposed 104 furlough hours, it specified that the 104 furlough hours had
10 to be taken by June 18, 2010. Since the LPOA's August 28, 2009 proposal noted that the LPOA
11 would "accept furloughs of 104 work hours for each year," there is no dispute that the LPOA
12 clearly understood that the City needed a certain amount of savings in each fiscal year.

13 The portion of the record relied upon for this exception is:

14 1. Reporter's Transcript, Vol. I, p.28:20-21; p.30:4-7; p.30:18-31:5; p.31:9-20;
15 p.32:4-12; p.33:2-5; p.36:10-13; p.55:15-28; p.56:15-57:10; p.73:8-15; p.74:15-21; p.80:26-81:9;
16 p.85:7-86:22; p.87:23-88:21; p.91:12-14; p.92:10-28; p.103:13-105:19; p.105:25-106:5;
17 p.106:24-107:3; p.131:7-13; p.133:17-134:7; p.134:27-135:26; p.136:4-13; p.160:2-161:18;
18 p.162:15-21; p.175:15-176:12; p.182:4-22; p.183:8-184:5; p.186:12-187:12; p.193:3-24;
19 p.199:10-20.

20 2. Reporter's Transcript, Vol. II, p.18:2-27; p.20:4-12; p.29:17-30:12; p.47:5-7;
21 p.48:3-9; p.96:9-21; p.97:12-98:11; p.108:12-109:6; p.111:14-24; p.114:15-115:9; p.125:16-
22 126:5; p.136:24-26; p.138:20-139:5; p.141:20-142:18; p.143:6-14; p.149:25-150:8; p.150:21-26;
23 p.151:10-19; p.162:15-21.

24 3. Reporter's Transcript, Vol. III, p.17:13-28; p.19:2-20:3; p.39:11-40:4; p.43:20-
25 44:6; p.45:6-11; p.68:1-69:13; p.70:23-26.

26 4. City's Exhibits E, F, O, P, Q, R, AA, CC, DD, FF, GG, HH, II, JJ, QQ, RR, SS,
27 UU, VV (pp.16-17), YY (p.18.).

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EXCEPTION NO. 2:

Exception is taken to the ALJ's finding at page 14 of the proposed decision that, "At the end of the mediation, the City gave the mediator what it called its 'Revised Last/Best/Final Offer' (Revised LBFO) to give to the Association. There was no further mediation or negotiation."

This finding is excepted to because it is factually erroneous. The uncontroverted evidence shows that the City presented the Revised LBFO to the LPOA "near the end of the mediation" not "at the end of the mediation." In fact, the testimony was so clear that when Mr. McGill wanted to get into it further, the ALJ even stated on the record: "You know, the witness has testified that the mediator presented the City's revised last, best and final offer. I believe that was near the end of the mediation session." (See TR, Vol. III, p.44:27-48:2.)

Further, as reflected in the Revised LBFO, the City specifically noted, "...as the parties were not able to reach agreement prior to June 20, 2009, the City *proposes modifying* the terms of this reduction to account for the passage of time. ¶ The City *now proposes* a 10.769% reduction for 12 consecutive pay-periods (effective for the pay period paid on January 22, 2010 through June 18, 2010) ...¶ The percentage reduction applied will depend on the time period over which it is applied, i.e., the longer the period the smaller the percentage reduction, similarly, the shorter the time period, the greater the percentage reduction." (See City's Exhibit QQ.) The uncontroverted evidence shows that the LPOA, having received the City's Revised LBFO "near the end of the mediation," *raised no questions regarding the offer after it was presented.*

The uncontroverted evidence also shows that on December 29, 2009, after the mediation, but prior to implementation, Mr. Yanonis invited the LPOA to contact him to discuss any questions it had regard regarding the Revised LBFO. There is no evidence also that the LPOA ever contacted Mr. Yanonis or otherwise sought clarification from the City regarding the modification proposed in the LBFO. Furthermore, the evidence shows that on January 6, 2010, after the City Council's January 5, 2010 decision to implement the Revised LBFO but prior to actual implementation, the City again invited the LPOA to bargain. The uncontroverted evidence also shows that the LPOA did *not* respond to these offers.

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The portion of the record relied upon for this exception is:

1. Reporter's Transcript, Vol. I, p.35:24-27; p.55:15-28; p.56:15-57:10; p.80:26-81:9; p.88:13-15; p.103:13-105:19; p.105:25-106:23; p.186:12-187:21; p.199:10-20.

2. Reporter's Transcript, Vol. II, p.29:17-30:12; p.95:21-96:3; p.97:22-98:11; p.114:15-115:9; p.133:7-20; p.142:7-20; p.143:6-14.

3. Reporter's Transcript, Vol. III, p.25:24-26:12; p.39:11-40:18; p.41:7-13; p.43:20-44:6; p.44:27-48:2; p.98:2-7.

4. City's Exhibits F, Q, CC, QQ, RR, SS.

EXCEPTION NO. 3:

Exception is taken to the ALJ's conclusion, at page 13 of the Proposed Decision that, "The Revised LBFO with its 10.769 percent reduction was never subject to negotiation or mediation."

This conclusion is excepted to because it is factually erroneous. The uncontroverted evidence establishes that the City presented the Revised LBFO and that the LPOA received the Revised LBFO while the parties were still participating in mediation. Indeed, the ALJ even stated on the record, "You know, the witness has testified that the mediator presented the City's revised last, best and final offer. I believe that was near the end of the mediation session." (See TR, Vol. III, p.44:27-48:2.) Further, as reflected in the Revised LBFO, the City specifically noted,

...as the parties were not able to reach agreement prior to June 20, 2009, the City proposes modifying the terms of this reduction to account for the passage of time. ¶ The City now proposes a 10.769% reduction for 12 consecutive pay-periods (effective for the pay period paid on January 22, 2010 through June 18, 2010) ...¶ The percentage reduction applied will depend on the time period over which it is applied, i.e., the longer the period the smaller the percentage reduction, similarly, the shorter the time period, the greater the percentage reduction." (See City's Exhibit QQ.)

The uncontroverted evidence establishes that the LPOA, having received the City's Revised LBFO "near the end of the mediation," raised no questions regarding the offer after it was presented.

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1 The uncontroverted evidence also shows that on December 29, 2009, after the mediation,
2 but prior to implementation, Mr. Yanonis invited the LPOA to contact him to discuss any
3 questions it had regard regarding the Revised LBFO. There is no evidence also that the LPOA
4 ever contacted Mr. Yanonis or otherwise sought clarification from the City regarding the
5 modification proposed in the LBFO. Furthermore, the evidence establishes that on January 6,
6 2010, after the City Council's January 5, 2010 decision to implement the Revised LBFO but prior
7 to actual implementation, the City again invited the LPOA to bargain. The uncontroverted
8 evidence also shows that the LPOA did *not* respond to these offers.

9 This conclusion is also excepted to because even if the 10.769% reduction was not itself
10 subject to negotiation or mediation, it was still reasonably comprehended within the City's prior
11 proposals that identified 104 furlough hours or a 5% reduction in salary for fiscal year 2009-2010.

12 The portion of the record relied upon for this exception is:

- 13 1. Reporter's Transcript, Vol. I, p.35:24-27; p.55:15-28; p.56:15-57:10; p.80:26-81:9;
14 p.88:13-15; p.103:13-105:19; p.105:25-106:23; p.186:12-187:21; p.199:10-20.
- 15 2. Reporter's Transcript, Vol.II, p.29:17-30:12; p.95:21-96:3; p.97:22-98:11;
16 p.114:15-115:9; p.133:7-20; p.142:7-20; p.143:6-14.
- 17 3. Reporter's Transcript, Vol. III, p.25:24-26:12; p.39:11-40:18; p.41:7-13; p.43:20-
18 44:6; p.98:2-7.
- 19 4. City's Exhibits F, Q, CC, QQ, RR, SS.

20 **EXCEPTION NO. 4:**

21 Exception is taken to the ALJ's conclusion, at page 13 of the Proposed Decision that "The
22 Revised LBFO was presented only when all negotiation and mediation had ended. At that point, it
23 was not even a 'take it or leave it' proposal. It was simply a matter of 'take it.'"

24 This conclusion is excepted to because it is factually erroneous. The uncontroverted
25 evidence shows that the City presented the Revised LBFO to LPOA and that the LPOA received
26 the Revised LBFO while the parties were still participating in mediation. In fact, the ALJ even
27 stated on the record: "You know, the witness has testified that the mediator presented the City's
28 revised last, best and final offer. I believe that was near the end of the mediation session." (See

1 TR, Vol. III, p.44:27-48:2.)

2 Further, as reflected in the Revised LBFO, the City specifically noted, "...as the parties
3 were not able to reach agreement prior to June 20, 2009, the City *proposes modifying* the terms of
4 this reduction to account for the passage of time. ¶ The City *now proposes* a 10.769% reduction
5 for 12 consecutive pay-periods (effective for the pay period paid on January 22, 2010 through
6 June 18, 2010) ...¶ The percentage reduction applied will depend on the time period over which it
7 is applied, i.e., the longer the period the smaller the percentage reduction, similarly, the shorter
8 the time period, the greater the percentage reduction." (See City's Exhibit QQ.)

9 The uncontroverted evidence also shows that the LPOA raised no questions regarding the
10 offer after it was presented and never sought to negotiate the City's proposed 10.769% reduction
11 for 12 consecutive pay-periods.

12 The uncontroverted evidence also establishes that on December 29, 2009, more than ten
13 days after the proposal, and with no response from the LPOA, the City notified the LPOA that it
14 would be submitting the parties' impasse "to the City Council for resolution...." (See City's
15 Exhibit RR.) The ALJ's failure to consider and properly weigh all the evidence leads to the
16 erroneous conclusion that the Revised LBFO "was not even a 'take it or leave' proposal," but
17 "simply a matter of 'take it'."

18 Finally, this finding is excepted to because even if the 10.769% reduction was not itself
19 subject to negotiation or mediation, it was still reasonably comprehended within the City's prior
20 proposals that identified a 5% reduction in salary for fiscal year 2009-2010.

21 The portion of the record relied upon for this exception is:

- 22 1. Reporter's Transcript, Vol. I, p.103:13-105:19; p.186:12-187:21; p.199:10-20.
- 23 2. Reporter's Transcript, Vol. II, p.29:17-30:12l; p.95:21-96:3; p.97:22-98:11;
24 p.114:15-115:9; p.133:7-20; p.142:7-20; p.143:6-14.
- 25 3. Reporter's Transcript, Vol. III, p.25:24-26:12; p.39:11-40:18; p.41:7-13; p.43:20-
26 44:6; p.44:27-48:2; p.98:2-7.
- 27 4. City's Exhibits F, Q, CC, QQ.

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EXCEPTION NO. 5:

Exception is taken to the ALJ's conclusion, at pages 13 and 14 of the proposed decision, that "the employer's salary reduction proposal did not reasonably comprehend the salary reduction methodology it implemented."

This conclusion is excepted to because the ALJ provided no rationale or analysis to support that conclusion. Although the ALJ does provide a brief summary of the salary reduction implemented in *Laguna Salada Union School District* (1995) PERB Decision No. 1103, the ALJ does not explain why the salary reduction methodology that the City implemented here was not reasonably comprehended in the City's prior proposals which reflected a need to obtain 5% savings in salary in each fiscal year.

Further, PERB's decision in *Laguna Salada* is distinguishable from the instant case. In *Laguna Salada*, the district, as a result of its worsening financial situation, had proposed a 1.76% reduction in the salary schedule which would be retroactive to the start of the academic year. The district and the association reached impasse on that 1.76% reduction, and participated in factfinding. Following the completion of the factfinding process more than six months later, the district implemented the 1.76% reduction in salary schedule, retroactive to the start of the academic year, and recouped the ten months of overpayments by a single deduction 17.6% from the unit members' pay warrants. (Id.)

In a 2-1 reversal of the administrative law judge's decision, the majority held that the district's implementation of the 17.6% reduction constituted an unlawful unilateral change because the district failed to negotiate the methodology used to adjust the unit member's wages. It found that the district's proposal to implement a 1.76% reduction in the salary scale, even though retroactive, did not "reasonably comprehend that the entire annual amount must be deducted from employee paychecks before the end of the 1992-93 year." (Id.)

As the Board explained, it was "unclear from the proposal what action the District would have taken had implementation occurred in any month prior or subsequent to June 1993." (Id.) The Board also noted that that there was nothing in the parties' joint stipulation to indicate that the district ever communicated the methodology it planned to utilize to the association. (Id. at fn.

1 4.) There was also no indication that the district ever identified a set amount of savings it needed
2 to obtain for that academic year.

3 Here, in contrast, the City did make it clear very early on that the longer the negotiations
4 took (1) the narrower the window for cost savings would be, and as a result (2) the greater the
5 impact on the employees would be. The City also identified not only that it needed the 5% cost
6 savings in both the 2009-2010 fiscal year and 2010-2011 fiscal year, but it also identified the
7 exact dollar amount need for each fiscal year, i.e., \$249,365. Furthermore, unlike the employer in
8 *Laguna Salada*, the City did not deduct the 5% cost savings needed for fiscal year 2009-2010 in
9 one lump sum after the Council implemented the City's Revised LBFO. Had the City done so, it
10 would have deducted 75% from the employees' pay warrants in January 2010 instead of just
11 the 10.769% it did.

12 Finally, unlike the employer in *Laguna Salada*, the City did not blindside the LPOA with
13 its implementation of the 10.769% salary reduction. Instead, as noted above, the City had
14 repeatedly noted that the longer negotiations took the less time there would be to collect the
15 needed savings and the greater the impact on employees would be. The City also provided the
16 LPOA with its Revised LPOA while the parties were still participating in mediation, but the
17 LPOA had no questions regarding the revised proposal. The lack of questions is telling and
18 evidences the fact that LPOA knew what the 10.769% salary reduction meant. The City also then
19 provided the LPOA with a week's notice that it would be presenting its Revised LBFO to the City
20 Council for impasse resolution, and invited the LPOA to contact the City to discuss any questions
21 it had regarding the Revised LBFO. Again, the LPOA did nothing. Thus, unlike the situation in
22 *Laguna Salada*, the City's implementation of the 10.769% salary deduction does not constitute an
23 unlawful unilateral change.

24 The portion of the record relied upon for this exception is:

25 1. Reporter's Transcript, Vol. I, p.28:20-21; p.30:4-7; p.30:18-31:5; p.31:9-20;
26 p.32:4-12; p.33:2-5; p.36:10-13; p.55:15-28; p.56:15-57:10; p.73:8-15; p.74:15-21; p.80:26-81:9;
27 p.85:7-86:22; p.87:23-88:21; p.91:12-14; p.92:10-28; p.103:13-105:19; p.105:25-106:5;
28 p.106:24-107:3; p.131:7-13; p.133:17-134:7; p.134:27-135:26; p.136:4-13; p.160:2-161:18;

1 p.162:15-21; p.175:15-176:12; p.182:4-22; p.183:8-184:5; p.186:12-187:12; p.193:3-24;
2 p.199:10-20.

3 2. Reporter's Transcript, Vol. II, p.18:2-27; p.20:4-12; p.29:17-30:12; p.47:5-7;
4 p.48:3-9; p.96:9-21; p.97:12-98:11; p.108:12-109:6; p.111:14-24; p.114:15-115:9; p.125:16-
5 126:5; p.136:24-26; p.138:20-139:5; p.141:20-142:18; p.143:6-14; p.149:25-150:8; p.150:21-26;
6 p.151:10-19; p.162:15-21.

7 3. Reporter's Transcript, Vol. III, p.17:13-28; p.19:2-20:3; p.39:11-40:4; p.43:20-
8 44:6; p.45:6-11; p.68:1-69:13; p.70:23-26.

9 4. City's Exhibits E, F, O, P, Q, R, AA, CC, DD, FF, GG, HH, JJ, QQ, RR, SS, VV,
10 YY.

11 **EXCEPTION NO. 6:**

12 Exception is taken to the ALJ's conclusion, at page 17 of the Proposed Decision that,
13 "The problem with what Yanonis did is that he failed to turn his suggestions into a specific
14 proposal on salary reduction methodology, which would then have been subject to bargaining and
15 impasse procedures. This failure turned the implementation of a specific salary reduction
16 methodology into an unlawful unilateral change." (See Proposed Decision, p.17.)

17 This conclusion is excepted to because the evidence establishes that the City, very early
18 on in the negotiations, had clearly advised the LPOA that it needed a 5% savings for the 2009-
19 2010 fiscal year *and* that the actual dollar amount needed in salary concessions for the 2009-2010
20 fiscal year (whether taken as furlough hours or a salary reduction) was \$249,365.00.

21 The evidence further establishes that the LPOA understood that the City was looking for
22 5% savings in *each* fiscal year from each unit. In fact, as the ALJ himself noted at p.17 of the
23 proposed decision, "The evidence did show that Yanonis said that the longer the negotiations
24 took, the narrower the window for cost savings would be, and the greater the damage to the
25 employee would be." The ALJ also noted that, "Yanonis made his statements in the context of
26 bargaining, and only to the Association's bargaining representatives." (See Proposed Decision, p.
27 17.)

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Further, to the extent that the LPOA felt that the City should have obtained the 5% salary savings from its members in a manner other than having the reduction spread evenly across the remaining pay periods, then it was the LPOA's responsibility to raise the issue. Since there is no evidence that the LPOA ever questioned the methodology the City would use to obtain the 5% salary savings for fiscal year 2009-2010 prior to the start of that fiscal year, and no evidence that the LPOA ever questioned the methodology after negotiations continued into the 2009-2010 fiscal year, the City's implementation of a 10.769% salary reduction spread evenly across the remaining pay periods to obtain the needed 5% salary savings was reasonably comprehended as within the City's previous proposals.

The portion of the record relied upon for this exception is:

1. Reporter's Transcript, Vol. I, p.35:24-27; p.55:15-28; p.56:15-57:10; p.80:36-81:9; p.88:13-15; p.103:13-105:19; p.105:25-106:23; p.186:12-187:21; p.199:10-20.
2. Reporter's Transcript, Vol. II, p.29:17-30:12; p.95:21-96:3; p.97:22-98:11; p.114:15-115:9; p.133:7-20; p.142:7-20; p.143:6-14.
3. Reporter's Transcript, Vol. III, p.25:24-26:12; p.39:11-40:18; p.41:7-13; p.43:20-44:6; p.98:2-7.
4. City's Exhibits F, Q, CC, QQ, RR.

EXCEPTION NO. 7:

Exception is made to the ALJ's proposed remedy and proposed order in Unfair Practice Charge No. LA-CE-585-M, to the extent that it found that the City violated the Meyers-Milias-Brown Act (MMBA), Government Code sections 3503, 3506 and 3509(b) , by unilaterally implementing a salary reduction without negotiating the salary reduction methodology with the LPOA. (See Proposed Decision, pp.19-22.)

This exception is based on the exceptions already set forth in this Statement of Cross-Exceptions and in the City's Brief in Support of Its Statement of Cross-Exceptions.

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1 **EXCEPTION NO. 8:**

2 Exception is made to the ALJ's proposed remedy and proposed order that the City "make
3 whole" the non-sworn unit members who "suffered a salary reduction of 10.769 percent...." (See
4 Proposed Decision, p.21.) The City excepts to this proposed remedy and order because it is
5 ambiguous as to whether it is ordering the City to reimburse the non-sworn unit members the
6 entire 10.769%, or just the additional 5.769% deducted from January 2010 through June 2010.
7 This exception is based on the exceptions already set forth in this Statement of Cross-Exceptions
8 and in the City's Brief in Support of Its Statement of Cross-Exceptions.

9 **V. CITY OF LOMPOCS BRIEF IN SUPPORT OF ITS STATEMENT OF CROSS-**
10 **EXCEPTIONS**

11 **A. STANDARD OF REVIEW**

12 In reviewing an ALJ's proposed decision, the Board is free to consider the entire record
13 and draw its own conclusions from the evidence presented. (*Yolo County Superintendent of*
14 *Schools* (1990) PERB Dec. No. 838.) When the Board does so it will determine that the City did
15 not engage in unlawful unilateral action because (1) the implemented terms were reasonably
16 comprehended within the City's pre-impasse proposals; (2) the City did not display an inflexible
17 attitude in its Revised LBFO; and (3) the LPOA received notice of the proposed change but failed
18 to request to bargain.

19 **B. THE 10.769% SALARY REDUCTION CONTAINED IN THE CITY'S**
20 **REVISED LAST, BEST AND FINAL OFFER DID NOT CONSTITUTE AN**
21 **UNLAWFUL UNILATERAL CHANGE BECAUSE IT WAS**
REASONABLY COMPREHENDED IN THE CITY'S PRE-IMPASSE
PROPOSALS

22 The City does not dispute that an employer's unilateral change in terms and conditions of
23 employment before reaching impasse or completing statutory impasse procedures is a per se
24 violation of the duty to bargain in good faith. (*County of Sonoma* (2010) PERB Dec. No. 2100-
25 M, p.12.) However, it is also well settled that once impasse has been reached, and statutory
26 impasse procedures completed, an employer is free to implement changes reasonably
27 comprehended within its last, best and final offer. (*Id.*)

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1 In this regard, an employer is not obligated to “implement changes *absolutely identical*
2 with its last offer on a given issue.” (*Public Employment Relations Board v. Modesto City Schools*
3 *District* (1982) 136 Cal.App.3d 881, 900 [citations omitted; emphasis in original].) Thus,
4 “matters reasonably comprehended within pre-impasse negotiations include neither proposals
5 better than the last best offer nor proposals less than the status quo which were not previously
6 discussed at the table.” (*Sonoma*, at pp.12-13, citing *Modesto City Schools* (1983) PERB Dec.
7 No. 291, at p.47.)

8 Here, the City’s proposals prior to impasse called for 5% costs savings in the amount of
9 \$249,365 for fiscal year 2009-2010 with the savings to be obtained through either 104 furlough
10 hours to be completed before June 18, 2010 or through a 5% salary reduction. (See Exhibits E, F,
11 N, O, P, Q, AA, CC, GG, HH, II and JJ.) The Revised LBFO the City issued on December 18,
12 2009 still called for that same 5% cost savings (\$249,365) for fiscal year 2009-2010, but included
13 a proposal that the savings now be obtained through a 10.769% salary reduction given the
14 shortened time remaining in the fiscal year to obtain the needed 5% cost savings. (See Exhibit
15 QQ.)

16 More than two weeks later, and after the City notified the LPOA that it would be
17 presenting its Revised LPOA to the City Council for impasse resolution, the City Council
18 implemented the City’s Revised LBFO. (See Exhibits RR, SS.) The City still implemented a 5%
19 savings for fiscal year 2009-2010, but did so by way of a 10.769% salary reduction. (See
20 Exhibits QQ, RR, and SS.) Since the City’s pre-impasse proposals and communications with the
21 LPOA had repeatedly noted that “the longer the negotiations took, the narrower the window for
22 cost savings would be, and the greater the damage to the employee would be,” the Revised LBFO
23 is not a “significant departure” from the City’s prior proposals. (*Sonoma, supra*, PERB Dec. No.
24 2100-M, p.14.)

25 In *Charter Oak Unified School District* (1991) PERB Decision No. 873, PERB noted that
26 since “[a]ll of the provisions for which changes were implemented had been subject to
27 negotiations by the parties, ... the Association had notice that changes were contemplated.” (*Id.*
28 at p.15.) In finding that implemented changes *were* reasonably comprehended in the prior

1 proposals, PERB did not require specificity as to the proposals. Rather, PERB merely required
2 that the provisions for which changes were contemplated had been negotiated. As PERB
3 explained:

4 All of the provisions for which changes were implemented had
5 been subject to negotiation by the parties, so the Association had
6 notice that changes were contemplated. Because the last, best and
7 final offer was a "package proposal," we decline to dissect the
8 package to separately compare each provision of the package to
9 prior proposals concerning that provision. Looking at the totality of
10 negotiations, we find the changes implemented were reasonably
11 comprehended within pre-impasse proposals. (*Id.*, at p. 15.)

12 Likewise, the methodology the City implemented is also not a "significant departure"
13 from the City's pre-impasse proposals. The pre-impasse proposals called for a 5% salary savings
14 that would be obtained over the course of the 2009-2010 fiscal year, and specifically noted that
15 they had to be obtained prior to June 18, 2009. (See Exhibits E, F, N, O, P, Q, AA, CC, GG,
16 HH, II, JJ.) The Revised LBFO the City implemented still called for a 5% salary savings for
17 fiscal year 2009-2010, and still ensured that it would be obtained by June 18, 2009. (See Exhibit
18 QQ.) As such, the City's Revised LBFO was reasonably comprehended within its prior
19 proposals, and the City's implementation following completion of the impasse procedures does
20 not constitute an unlawful unilateral change.

21 **C. THE CITY DID NOT DISPLAY AN INFLEXIBLE ATTITUDE IN ITS**
22 **REVISED LBFO**

23 The ALJ also erred in concluding that the City's Revised LBFO presented to the LPOA
24 near the end of the mediation was not even a "take-it-or-leave-it" proposal, but just a "take-it"
25 proposal. (See Proposed Decision, p. 13.) Because of that erroneous conclusion, the ALJ found
26 that the City engaged in an unlawful unilateral change. The evidence does not establish the

27 City had an inflexible attitude with respect to the Revised LBFO. Even if it did, having an
28 inflexible attitude is not an indicia of unlawful unilateral action. (See Section IV.D, *infra*.)

The City acknowledges that entering negotiations with a "take-it-or-leave-it" attitude may
be one indicia of surface bargaining. (*State of California (Department of Corrections &*
Rehabilitation, Department of Personnel Administration) (2010) PERB Dec. No 2115-S, p.10.) It
is the essence of surface bargaining that a party goes through the motions of negotiations, but in

fact is weaving otherwise unobjectionable conduct into an entangling fabric to delay or prevent agreement. (*City and County of San Francisco* (2007) PERB Dec. No. 1890-M, at p. 10, citing *Muroc Unified School District* (1978) PERB Decision No. 80.)

Here, however, the ALJ found that, “[i]n the present case, the allegations of surface bargaining were often not proven and were generally insufficient to establish bad faith.” (See Proposed Decision, p.19.) The ALJ also concluded that “all allegations of bad faith surface bargaining must be dismissed.” (Id.) Consequently, since there is no evidence that the City engaged in surface bargaining, there is no support for the ALJ’s contradictory conclusion that the City’s presentation of the Revised LBFO constituted a “take-it” proposal. Accordingly, the proposed decision must be reversed.

D. THE LPOA DID NOT ESTABLISH BY A PREPONDERANCE OF THE EVIDENCE THAT THE CITY ENGAGED IN UNLAWFUL UNILATERAL ACTION

The proposed decision is also erroneous because it finds that the City’s implementation of the Revised LBFO constitutes an unlawful unilateral change. As demonstrated below, however, the evidence does not support that conclusion.

When an employer gives an employee organization written notice of a proposed change to a matter within the scope of representation and provides reasonable opportunity to meet and confer over the change before implementation, the employee organization’s failure to request bargaining constitutes a waiver of its right to meet and confer over the change. (*Metropolitan Water District of Southern California* (2009) [*Metropolitan Water*] PERB Dec. No. 2055-M, pp. 4-5.)

Further, once an employer gives appropriate notice of a proposed change, it is not required to invite bargaining. (*Metropolitan Water, supra*, PERB Dec. No. 2055-M, p.5.)

Here, the City provided the LPOA with its Revised LBFO on December 18, 2009 during mediation. That Revised LBFO constituted written notice of the City’s proposal to reduce LPOA unit members’ salaries by 10.769% for 12 pay periods (which is the same 5% cost savings for fiscal year 2009-2010 that the City had been seeking throughout the negotiations). The LPOA had the opportunity to ask questions about the Revised LBFO, but it had none. (See Exhibit QQ;

1 see also TR Vol. I, p.104:11-24.) It is reasonable to assume that LPOA had no questions because
2 it comprehended the City's Revised LBFO.

3 On December 29, 2009, eleven days after the City presented its Revised LBFO to the
4 LPOA, Mr. Yanonis provided the LPOA with seven-days' written notice of the City's intent to
5 present its Revised LBFO to the City Council for impasse resolution on January 5, 2009. In that
6 written notice, Mr. Yanonis invited the LPOA to contact him if it had any questions regarding the
7 Revised LBFO. (See Exhibit RR; see also TR, Vol.I, p.105:25-106:23.)

8 Although the LPOA had more than two weeks' notice of the City's Revised LBFO, the
9 record contains no evidence that the LPOA ever requested to negotiate the City's proposal to
10 obtain the 5% costs savings for fiscal year 2009-2010 through a 10.679% salary reduction for 12
11 pay periods. Not only is there no evidence that the LPOA ever requested to meet and confer, but
12 there is also no evidence that, having received more than two weeks' notice, it ever expressed any
13 objection to that proposal prior to its implementation.

14 For all these reasons, the ALJ's conclusion that the City engaged in unlawful unilateral
15 action is erroneous. The Board must reverse the ALJ's conclusion accordingly.

16 **E. THE PROPOSED REMEDY IS AMBIGUOUS**

17 In his proposed decision, the ALJ ordered that the City make whole the non-sworn unit
18 members "who suffered a salary reduction of 10.769 percent for the 12 pay periods paid on
19 January 22, 2010 through June 18, 2010," (See Proposed Decision, p.21.) But there is no
20 explanation as to whether this "make whole" remedy requires reimbursement of the entire
21 10.769% or just the 5.769% above the City's previously proposed 5% salary reduction, which the
22 ALJ acknowledges "was negotiated to impasse and went through mediation. (See Proposed
23 Decision, p. 13.)

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1 **VI. CONCLUSION**

2 For all the reasons set forth above, the City respectfully requests that PERB reverse the
3 ALJ's proposed decision to the extent it found that the City engaged in unlawful unilateral action
4 by implementing a 10.769 percent reduction in salary, and issue an order dismissing both the
5 Complaint and the Unfair Practice Charge that issued in LA-CE-585, and that such dismissal be
6 with prejudice.

7 Dated: June 21, 2012

LIEBERT CASSIDY WHITMORE

8
9 By: _____
10 Adrianna E. Guzman
11 Attorneys for Respondent
12 CITY OF LOMPOC
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**PROOF OF SERVICE
STATE OF CALIFORNIA, COUNTY OF LOS ANGELES**

I am employed in County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is: 6033 W. Century Boulevard, Suite 500, Los Angeles, California 90045.

On June 21, 2012, I served the foregoing document described as **CITY OF LOMPOC'S RESPONSE TO LOMPOC POLICE OFFICERS ASSOCIATION'S STATEMENT OF EXCEPTIONS AND BRIEF IN SUPPORT OF STATEMENT OF EXCEPTIONS; AND CITY OF LOMPOC'S CROSS-EXCEPTIONS AND BRIEF IN SUPPORT OF CROSS-EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S PROPOSED DECISION DATED MAY 9, 2012** on all interested parties in this action by placing a true copy thereof enclosed in sealed envelope(s) addressed as follows:

Michael A. McGill
Lackie, Dammeier & McGill
367 N. Second Avenue
Upland, CA 91768

☒ **BY MAIL**

I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Los Angeles, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

☐ **BY OVERNIGHT**

By overnight courier, I arranged for the above-referenced document(s) to be delivered to an authorized overnight courier service, _____, for delivery to the addressee(s) above, in an envelope or package designated by the overnight courier service with delivery fees paid or provided for.

Executed on June 21, 2012, at Los Angeles, California.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Erlinda Bernabe

Type or Print Name

Signature